Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
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PETITION FOR RECONSIDERATION AND CLARIFICATION

Of Counsel:
Karen Edwards
Graduate Fellow, Georgetown
University Law Center

Jeffrey S. Hops
Director, Government Relations
Alliance for Community Media
666 11th Street, N.W., Suite 806
Washington, D.C. 20001
(202) 393-2650

John Podesta
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9535

James Horwood, Esq.
Spiegel & McDiarmid
1350 New York Ave., N.W., Suite 1100
Washington, D.C. 20005
(202) 879-4000

Jill Lesser
People for the American Way
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

Gigi Sohn
Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 232-4300

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The Alliance for Community Media, the Alliance for Communications Democracy, People for the American Way, the Center for Media Education, and the Media Access Project ("the Coalition") respectfully petition the Commission to reconsider and clarify issues decided in the Second Report and Order, FCC 96-249, in the above-captioned proceeding, released June 3, 1996 ("Second Order"). The Coalition congratulates the Commission for its achievement in promulgating a substantial, well-considered rulemaking in a very short period of time, in order to comply with the statutory deadline set by Congress.[1] In general, the Commission has issued a rule that furthers the policy goals of Congress and protects the First Amendment rights.

However, the Coalition is concerned that some elements of the Second Order do not promote Congress' goals of flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice.[2] In particular, the Coalition believes that some provisions of the Second Order give open video system ("OVS") operators substantial deregulatory "incentives" without any countervailing requirements that would make OVS any different than cable. We therefore respectfully request that the Commission reconsider those elements of the rulemaking which, we believe, will result in OVS operators potentially being able to exercise substantially more editorial control over their platforms than cable operators may exercise over their cable systems.

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[1] Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat 56, approved February 8, 1996 (the "Telecommunications Act" or "The Act"), § 302, codified at 47 U.S.C. § 573(b)(1). (1996). The law requires any rulemaking, including reconsideration, to be completed by August 8, 1996.

[2] Report and Order and Notice of Proposed Rulemaking in CS Dk. No. 96-46, released March 11, 1996 ("NPRM") at ¶ 4.

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION NOT TO IMPOSE A PRE-CERTIFICATION SEPARATE SUBSIDIARY REQUIREMENT.

Petitioners applaud the Commission's desire to streamline regulatory procedures to promote efficiency and encourage the construction of the National Information Infrastructure. However, the Coalition feels that some level of regulation is necessary to ensure that OVS is implemented to promote the public interest, necessity and convenience. Therefore, the Coalition asks for reconsideration of the Commission's refusal to impose a separate affiliate requirement prior to OVS platform certification. Such a requirement is essential to promote the goals of Section 653 of the Telecommunications Act of 1996 of establishing a both pro-competitive and deregulatory framework for the entry of local exchange carriers into the video programming marketplace.[3] Congress charged the Commission with crafting rules that would ensure "vigorous competition in entertainment and information markets,"[4] and "prohibit. . .discriminat[ion] among video programmers."[5] Failing to impose a separate affiliate requirement prior to certification may undermine the intent of Congress and pave the way for anti-competitive behavior that ultimately will harm consumers.

The only articulation of the Commission's basis for its decision is a one-paragraph conclusory statement of Congressional intent.[6] The Commission reasons that since "[s]ection 653 is silent on whether LECs and others

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[3] As the Commission repeatedly notes, Congress aimed to "provide a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advance telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 453, 104th Cong., 2d Sess. 113 (1996)("Conference Report"). See also Second Report and Order, In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems, FCC 96-249, at note 92 ("Second Order"; Notice of Proposed Rulemaking, In the Matter of Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, FCC 96-214, at para. 7-8 ("Cost Allocation NPRM").

[4] Conference Report, at 178.

[5] Conference Report, at 177.

[6] Second Order, at para. 249. The Commission states: "We believe that Congress' [sic] did not intend to impose a separate affiliate requirement on LECs providing open video service. . . . Since we conclude that Congress did not intend to apply a separate affiliate requirement in this context. . .we will adhere to Congress' intent and decline to impose a separate affiliate requirement here." Id.

must provide open video service through a separate affiliate," and since "Congress expressly directed that Title II requirements not be applied to the 'establishment and operation of an open video system' under Section 653,"[7] therefore Congress did not intend that a separate affiliate requirement be imposed. The Coalition believes that this approach to the issue of separate subsidiaries misses the point. Congress imposed on OVS operators obligations to be pro-competitive and non-discriminatory. The Commission must establish rules that would promote those goals. In the past, the Commission has adopted rules reflecting Congressional intent even though Congress did not specifically require any particular rule. As we argued in original comments --- an argument that the Second Order fails to distinguish or even address --- the Commission advocates a separate affiliate requirement for Bell Operating Companies which seek regulation as non-dominant carriers, although such a requirement is not specifically required by the Act.[8]

For the foreseeable future, a dominant LEC will remain the monopoly provider of local exchange service in its region and will have an enormous incentive to channel its substantial monopoly profits into the provision of video programming. Therefore, an effective safeguard against anti-competitive rate manipulation is critical. In its companion cost allocation proceeding, the Commission recognized the likelihood and harms of cross-subsidization. The basic goal of that proceeding was to ensure that telephone rates are just, reasonable and affordable,[9] by preventing incumbent local exchange carriers from "[using] services that are not competitive to subsidize services that are subject to competition."[10] The Commission expressly sought an administratively simple safeguard.[11] Cost allocation NPRM, at ¶ 24. Even if truly effective cost allocation procedures, short of a

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[7] Id. (footnote omitted)

[8] Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Dock NO. 96-21, FCC 96-59, Notice of Proposed Rulemaking, released February 14, 1996.

[9] Cost Allocation NPRM, at para. 22.

[10] Cost Allocation NPRM, at para 22; 1996 Act sec. 101(a), §254(k).

[11] The Commission sought to balance "administrative simplicity, adaptability to evolving technologies, [and] uniform application among incumbent local exchange carriers."

separate affiliate requirement, can be devised, such a process is neither simple nor quick. The contours of the market for the provision of video programming by LECs is still largely conceptual, and crafting effective rules will likely involve a lengthy "trial and error" process.

By contrast, requiring a separate affiliate is probably the simplest and most effective way of preventing cross-subsidization and securing full and fair competition. A separate affiliate requirement, even if adopted as an interim measure, would avoid exposing consumers of regulated services to the possibility of rate manipulation. Therefore, in light of the current lack of adequate cost allocation rules for integrated services,[12] the Commission's rejection of a separate affiliate requirement, its apparent failure to fully consider all the arguments presented in our Comments and provide a basis for its determination, are unreasonable.

More importantly, the short-term result of the current cost allocation proceeding is uncertain; the proceeding may not ultimately lead to effective cost allocation rules.[13] Given the more than 60 comments and reply comments submitted in the cost allocation docket--many offering widely different proposals for cost allocation--it is unclear when a final rule will be adopted and whether the necessary compromise will adequately protect consumers. No doubt any initial cost allocation rule for integrated systems will require refining. We urge the Commission not to use telephone ratepayers as guinea pigs to perfect its rules.

Therefore, although we believe that a separate affiliate requirement will ultimately be the most effective and administratively simple approach to preventing cross-subsidization and that such a requirement should become a permanent safeguard, we urge the Commission to at least require separate affiliates until an order is adopted in the cost allocation docket, the rules it approves are tested in the marketplace, and effective cost allocation rules are in place.

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[12] The Commission acknowledges that its "current [cost allocation] rules may not be adequate to address ... cost allocations for integrated systems providing both telephone and video services" See Second Order at ¶ 29, n. 92.

[13] By recognizing that the process of devising effective cost allocation procedures will take time, we do not mean to imply that we are neutral about which cost allocation method the Commission adopts. We strongly support the comments of the Consumer Federation of America and International Communications Association, filed in CC Docket NO. 96-112 (June 12, 1996).

II. THE COMMISSION'S RULES SHOULD CLARIFY THAT AN OVS OPERATOR MUST MEET ACCESS OBLIGATIONS CONTAINED IN EACH FRANCHISE AGREEMENT, UNLESS THE PARTIES REACH A NEGOTIATED ALTERNATIVE.

A. THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES THAT PUBLIC, EDUCATIONAL AND GOVERNMENTAL ("PEG") ACCESS ON OVS PROVIDE THE SAME LEVEL OF SERVICES AND SUPPORT TO THE NATION'S COMMUNITIES AS PEG ACCESS ON CABLE SYSTEMS.

1. OVS Operators That Overbuild Must Match the PEG Terms Memorialized in the Outstanding Franchise Agreement.

The Coalition applauds and supports the Commission's decision in this rulemaking to give the institution of public, educational, and governmental ("PEG") access its support in this rulemaking. The Commission has acted wisely in promulgating rules that will ensure that PEG on cable and PEG on OVS are more or less identical The Coalition believes that PEG access is an important resource for local communication and free speech, and is gratified to see that the Commission feels similarly.

However, a few points of clarification are necessary to ensure that the benefits promised by the statute actually reach American communities. Petitioners seek clarification of the Commission's Second Order, to ensure that the provision of the Telecommunications Act of 1996 [14] ("Telecommunications Act" or "Act") that specifically and unequivocally requires that § 611 of the 1984 Cable Act (47 U.S.C. § 531) be applied to OVS operators is fully implemented. Section 611 of the 1984 Cable Act permits franchise authorities to ask for and receive PEG access capacity, equipment, facilities and services from cable operators. By applying Section 611 to

[14]Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 et seq. (approved February 8, 1996).

OVS systems, the new law therefore requires OVS operators to provide access capacity, equipment, facilities and services to PEG access operations at the same level as the cable operator. In order to carry out the will of Congress, the Commission has ruled that OVS operators must contribute toward PEG access, services, facilities and equipment to the same extent as the local cable operator.[15]

The Second Order, however, confuses what should be a clear legal requirement. The statute requires the Commission to impose on OVS operators obligations that are, to the extent possible, no greater or lesser than the obligations imposed on cable operators.[16] The rule, however, does not permit either a cable operator or a franchise authority to unilaterally abrogate the terms of an existing franchise agreement. Moreover, the Second Order requires the open video system operator to satisfy the same contractual PEG access obligations as the local cable operator.[17] A cable operator and an OVS operator therefore could not "share"[18] an existing contractual commitment of a cable operator to a franchising authority without abrogating both the franchise agreement and Section 653(c)(2). The Commission should eliminate any possible confusion on this matter by stating that , in the absence of a negotiated alternative, the OVS operator must match the requirements imposed upon the cable operator by the franchise agreement. This will clarify that the Commission's regulation is not contrary to state contract law.

The Commission cannot properly employ an interpretation of "sharing" which would force entities providing PEG access to provide substantially more services on their existing budgets. As noted in Appendix A, the majority of PEG access centers exist on budgets of less than $200,000 per year; many PEG access centers exist on budgets of less than $10,000 per year. Requiring the OVS operator to add additional resources to cable operator-provided resources, instead of halving the often minimal level of PEG resources, will both comply with state contract law and allow PEG access centers to serve their communities adequately.

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[15] Second Order at ¶ 142.
[16] Telecommunications Act § 653(c)(2), 47 U.S.C. 573(c)(2); see also Second Order at ¶ 140 and n.326.
[17] Second Order at ¶ 141.
[18] Id.

2. Where Cable Operators Have Built I-Nets, OVS Operators Must Also Provide I-Nets.

Petitioners also seek reconsideration of the Commission's decision to exempt OVS operators from the obligation to provide institutional networks. The Commission does not have a rational basis for excluding institutional networks ("I-Nets") from those services that franchise authorities may require from OVS operators subject to Section 653(c)(2)(B).[19] As incorporated by that section, Section 611 of the 1984 Cable Act clearly contemplates that institutional networks can be required and constructed pursuant to that section. It is an incongruous reading of Section 611 that a franchise authority could require that an OVS operator require educational and governmental access on an institutional network without being able to require construction of the underlying network.[20] Moreover, there would have been no reason to include subsection 611(f) (defining institutional networks) in the cross-reference of Section 653(c)(2)(B), unless Congress had intended to require OVS operators to build institutional networks pursuant to Section 611[21] when the cable operator has been required by its franchise to build an I-Net. The Commission itself notes that Section 611(c), as applied through Section 653(c), imposes a responsibility on open video system operators to contribute toward PEG services, facilities and equipment to the same extent as the local cable operator.[22] Insofar as a cable operator is required to provide an institutional network which carries educational and governmental access, while an OVS operator is not, the OVS operator is not contributing toward PEG services, facilities and equipment to the same extent as the cable operator. Therefore the Commission's interpretation exempting OVS operators from providing institutional networks is contrary to law.

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[19] Id. at ¶ 211.
[20] 1984 Cable Act, Section 611(c), 47 U.S.C. § 531(c).
[21] Id. Section 611(f), 47 U.S.C. § 531(f).
[22] Second Order at ¶ 142.

B. OVS RULES SHOULD PROVIDE FOR THE POSSIBILITY THAT CITIES CAN INSTITUTE PEG CHANNELS IN THE ABSENCE OF A CABLE OPERATOR PROVIDING SERVICE IN THE FRANCHISE AREA.

The Coalition supports the Commission's sensible and reasonable approach to instituting PEG on OVS in those situations in which cable and OVS systems compete in the same geographic market. However, the Coalition believes it probable that, despite the Commission's efforts, facilities-based competition in the wireline video programming services sector may not be present in many communities. It is likely that some common carriers will purchase the facilities of incumbent cable operators and convert those facilities to OVS operations at the termination of any outstanding franchise period, pursuant to the buyout provisions of Section 652 of the 1996 Act.[23] The Commission has ruled that the operator be required to maintain the previously existing terms of PEG access obligations;[24] However, this rule is contrary to the language and meaning of Section 611 of the 1984 Cable Act. A mechanistic interpretation will have the result of freezing for all time the terms and conditions found in the franchise agreement existing at the time of the purchase/transfer/conversion. In most communities, this would leave the community without any PEG access whatsoever, because only 16 percent of cable systems have PEG access, and less than 10 percent of systems have any public access capability.[25]

In order to comply fully with Section 653(c)(1)(B) and Section 611 of the 1984 Act, the Commission must devise some flexible methodology to permit communities which did not receive PEG at the time the first franchise agreement was executed to request and receive PEG access, notwithstanding the absence of a franchise renewal process. This is required by Section 611(b), which permits franchise authorities to request PEG access as part of a renewal proceeding, as well as ab initio.[26] The Coalition recommends that where a cable system converts to an OVS system, the OVS operator be required to permit the local franchising authority to request

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[23] 1996 Act, Section 652, 47 U.S.C. § 572.
[24] Second Order at ¶ 151.
[25] See Aufderheide, "Cable Television and the Public Interest," in 42 Journal of Communication 52 (1992); see also affidavit of Barry R. Forbes, dated May 14, 1996, attached as Exhibit B.
[26] 47 U.S.C. § 531(b).

PEG at the time of conversion and then once every 10 years, pursuant to a needs assessment performed by the franchising authority. The Coalition endorses the provision in the rules[27] that require that the level of existing PEG access in surrounding communities with PEG be used as a benchmark for determining the level of services in these new service areas.

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO MAKE NON-PROFIT RATES VOLUNTARY RATHER THAN MANDATORY.

As the Commission acknowledges in both its NPRM and its Second Report and Order, one of the main justifications for Congress' decision to establish open video systems (OVS) was the ability to ensure a diversity of programming sources available to the public.[28] Indeed, the provisions of both the statute and the rules promulgated by the Commission make clear that OVS is intended to ensure programming diversity by requiring perceptible differences between the rules for the operation of a cable system and those guiding the operation of an OVS platform. Perhaps most importantly, OVS operators are not to have as much editorial flexibility or control over the video programming available over their systems, and entities unrelated to OVS operators are to have meaningful access to OVS platforms.[29]

As Petitioners have stated time and again in the Commission's proceedings relating to the video delivery marketplace,[30] the only way to reach true diversity in the video programming market is to ensure that

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[27] 47 C.F.R. § 76.1505(d)(6).

[28] NPRM at Para. 4; Second Order at para. 122.

[29] The Commission specifically stated in its NPRM "we believe that Congress also signaled its intent the programming would be offered on open video systems by entities other the open video system operators." NPRM at Para. 4.

[30] Comments of Center For Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, National Association of Artists' Organizations, United States Catholic Conference, Commercial Leased Access, CS Docket No. 96-60 (May 15, 1996); Reply Comments of Center For Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, Consumer Project on Technology, Media Access Project, National Alliance for Media Arts & Culture; National Association of Artists' Organizations, National Council on La Raza, United States Catholic Conference, People For the American Way, Leased Commercial Access, CS Docket No. 96-60 (May 31, 1996).

programmers are not denied access to video delivery mechanisms simply because they cannot compete in the commercial marketplace. Petitioners believe that the diverse and public spirited programming that many thousands of non-profit organizations in this country could offer would directly advance Congress's vision of diverse local and national programming and that such diversity would, in turn, promote and strengthen essential First Amendment values.[31] By acknowledging that the voluntary implementation of reduced rates for non-profits would be consistent with the statutory scheme established by Congress for OVS, the Commission tacitly recognizes the role that non-profits can play in achieving the diversity in programming that Congress envisioned.

It is curious therefore, that in its Second Report and Order, the Commission summarily rejects Petitioners' request to consider the necessity of mandating reduced rates for non-profit programmers on OVS operators.[32] Petitioners believe the Commission's decision not to impose mandatory non-profit rates without any discussion of the merits of the issue lacks any rational basis and should be reconsidered.

The Coalition believes that the Commission should establish a formula under which reasonable and non-discriminatory non-profit rates could be determined. However, because the Commission is under a statutory obligation to complete this proceeding quickly, and because considered judgment is imperative if a fair non-profit rate structure is to be established, the Coalition asks the Commission to initiate a separate proceeding to determine the exact formula in setting such rates.[33] The Coalition believes that such a proceeding will enable

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[31] Petitioners' plea for nonprofit rates is not, as some will undoubtedly claim, based on the belief that programming produced by non-profit organizations is inherently better than commercial programming. Indeed, we have argued in this proceeding and elsewhere in favor of reasonable access rates for both commercial and noncommercial programmers. Petitioners' call for non-profit rates is based on the belief that the OVS provisions of the Telecommunication Act cannot be implemented consistent with congressional intent without a scheme that encourages the most diverse group of unaffiliated programmers possible, and that non-profit programmers add to that diversity of programmers. Therefore access for nonprofit programming is not an attempt to single out one form of programming as "more valuable" but to assert that the greatest value comes from the greatest number of sources in a marketplace.

[32] Second Order at ¶ 130, fn. 300

[33] Pursuant to Section 653(b)(1) (47 U.S.C. § 573(b)(1)), the Commission need only decide to adopt mandatory non-profit rates to satisfy its statutory obligation to complete this proceeding within six months from the date of enactment of the Act. The Coalition does not believe that the Act requires that the precise formula for setting those rates be determined in the same time frame.

multiple interested parties to comment on the appropriate formula for non-profit rates and will help the Commission make the most considered judgment.

If, however, the Commission declines to initiate a separate proceeding, the Commission should adopt mandatory rates for non-profit programmers and require the calculation of those rates by using commercial rates as a benchmark. The Coalition suggests using the lowest commercial rate to unaffiliated programmers, or the lowest calculated imputed rate for affiliated programmers, whichever is lower, minus 25 percent (25 percent). The Coalition also recommends that this rate be revisited by the Commission if, after a reasonable period, it fails to draw non-profit programmers onto a substantial number of OVS systems.

A. THE MISTAKES OF CABLE LEASED ACCESS SHOULD NOT BE REPEATED.

While Congress clearly intended for open video systems to be distinct from cable systems, much can be learned from the historical struggle in the cable television context for the fair and reasonable implementation of leased access requirements which were also intended to promote diversity in the video programming market. In 1984 Congress passed Section 612 of the Cable Franchise Policy and Communications Act to help assure access by unaffiliated programmers to closed cable systems.[34] Between 1984 and 1996, however, the implementation of the leased access requirements has been an abject failure.[35]

It is clear that as Congress sought to establish a new scheme for the delivery of video programming by entities set to compete with cable operators, it sought to avoid the problems encountered in the leased access arena by establishing a system undergirded by traditional notions of common carriage. Congress required that OVS operators make up to two-thirds of their systems available to unaffiliated programmers. In addition,

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[34] H.R. Rep. No. 934, 98th Cong. 2d Sess. 47 (1984)

[35] 1990 Cable Report, and Annual Assessment of Competition in the Market for Video Programming Services, Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd 2060, 2064 (1995); Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, CS Docket No. 96-60, FCC 96-122 (March 21, 1996)("Leased Access Order"); Donna M . Lampert, Cable Television: Does Leased Access Mean Least Access?, 44 Fed. Comm.L.J. 245 (1992).

Congress left it to the considered judgment of the Commission to determine how rates for access to OVS platforms would be structured so as to effectuate the goal of program diversity.[36]

The Commission, apparently feeling constrained by Congress's mandate for reduced regulation for OVS operators, declined to establish meaningful regulations for the establishment of just and reasonable rates for OVS platforms and left it in the hands of would-be programmers to prove that the rates of a particular OVS operator are unjust or unreasonably discriminatory.[37] In so doing, however, the Commission may have sealed the fate of non-profit programmers in one fell swoop.

As these same Petitioners have argued in the leased access arena, if non-profit organizations are forced to compete for access to video delivery systems with commercial programmers, they will be entirely shut out of the video marketplace. With their disappearance, consumers will undoubtedly see a decrease in the diversity of programming available in contravention of the clear intent of Congress. Currently, many national non-profit organizations have hundreds, if not thousands, of hours of programming sitting on their storage shelves with no mechanism for distribution.[38] These organizations simply cannot afford the exorbitant rates paid by commercial programmers and therefore must opt not to show their programs. And as the problem of distribution worsens, these organizations will undoubtedly cease production of important programming -- including informational, educational, cultural, civic and other types of shows.

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[36] In the leased access context, Congress waited eight years between its enactment of leased access requirements and its grant of authority to the FCC to ensure that the rates being charged for leased access were not prohibitively high. To avoid that type of delay, Congress has established a common carrier model and simultaneously given the Commission jurisdiction to set reasonable rates.

[37] Second Order at ¶ 114.

[38] For example, the inability to pay to air programs, rather than the availability of programs, is the chief stumbling clock to placement of programs funded in whole or in part by the United States Catholic Conference must use most of their national collection for communications on production costs of video, radio programs and print projects. More than three-quarters of the dioceses surveyed have annual incomes for communications projects of than $75,00 annually (an average diocese covers several counties). That annual budget normally covers public relations activity, local newspapers and salaries.

B. OVS OPERATORS HAVE NO INCENTIVE TO OFFER NON-PROFIT RATES VOLUNTARILY.

Petitioners do not believe that the Commission's decision to permit voluntary rates for non-profits by individual OVS operators will provide meaningful access for non-profits. On the contrary, because Congress established OVS in such a way as to permit OVS operators to carry affiliated programmers on more than one-third of their systems if, and only if, supply for carriage exceeds demand, OVS operators have every incentive to keep prices high and unaffiliated programmers off. They have no incentive whatsoever to establish rates for non-profits.[39]

IV. THE SYSTEM THE COMMISSION PROPOSES TO REGULATE ACCESS PRICES CANNOT WORK WITHOUT REQUIRING OPERATORS TO DISCLOSE CONTRACTS.

The Coalition is in accord with the Commission's desire to create a regulatory scheme for OVS which will encourage facilities-based competition at the local level, and believes that a regulatory strategy that facilitates that outcome can encourage entry while still meeting the concerns of unaffiliated third-party programmers. However, competition needs to be encouraged, not only between wireline providers, but between programming services on the OVS platform as well. The Commission's decision not to require the

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[39] The Commission should not view the existence of PEG access requirements on some, or even most, OVS systems basis as a justification for denying Petitioners' request for mandatory non-profit rates. First, programming developed and distributed through locally negotiated requirements for public access facilities does not serve the same needs as programming developed and distributed by national non-profit organizations. In fact, the justification for local imposition of PEG requirements in both the cable and OVS contexts is the need to serve local communities with locally-based programming and services. However, just as there is commercial programming that is distributed nationally, so is there non-profit programming that would appeal to similarly wide audiences. Second, PEG requirements are not part of a national scheme but are left up to the discretion of local franchising authorities. As such, PEG cannot be the primary manner in which the Congress's interest in achieving program diversity is effectuated. While Petitioners obviously believe that PEG requirements will contribute significantly in ensuring that OVS platforms serve the needs of local communities, they do not justify for the wholesale denial of access for non-profit programmers.

disclosure of carriage contracts between the OVS operator and programmers, whether affiliated or unaffiliated,[40] will significantly undermine the Commission's ability to enforce the non-discriminatory access provisions of the 1996 Act[41] and thus harm competition in the video programming market. While the telephone commenters have alleged that disclosure of such contracts would "stifle competition by forcing them to divulge sensitive information,"[42] neither the telephone commenters nor the Commission have stated what particularly sensitive information would be included in those contracts, or how disclosure would adversely impact their businesses.[43] The Telephone Commenters' assertion of proprietary privilege is undocumented. The Coalition does not believe that this key element to controlling rates, terms and conditions of carriage so as to comply with the Act's non-discrimination provision should fail based on an unsubstantiated allegation of potential future harm. The Commission should put the telephone commenters' arguments to a rational test; if they are alleging harm, they should be required to at least provide some hypothetical chain of causality in which such disclosure would result in preventable harm.

An elementary principle of economics is that markets function most efficiently under conditions of easily-obtained information. Obversely, permitting goods and services to be bought and sold without pricing information provides economic inefficiency, as some prices may be well in excess of the most efficient marginal price, while others will be subsidized by the seller -- also resulting in an overall inefficient allocation of resources.[44] The pricing system is the nervous system of the economy; failure to disclose essential contract terms like carriage price interferes with the proper functioning of the free market and distorts the allocation of economic resources.

In order to carry out the intent of Section 653(b)(1)(A), OVS operators should be required to: a) carry all "affiliated" video programming through a separate subsidiary; b) execute a carriage contract with that subsidiary subject to arms-length negotiation, c) disclose that contract, and all contracts with unaffiliated third-

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[40] Id. at ¶132.
[41] § 653(b)(1)(A).
[42] Second Order at ¶ 132 and n. 302.
[43] See Id.
[44] See, e.g., Friedman, Microeconomic Policy Analysis (1984) at 381-382.

party programmers, by filing them with the Commission; and d) require that any subsequent unaffiliated programmer that wishes to obtain carriage be subject to the same price, terms and conditions as any contract already on file (with any pro-rata adjustments and bulk discounts as may be necessary).

In the absence of a disclosure requirement, it seems highly unlikely that the complaint process provided for in proposed 47 C.F.R. § 76.1513(e) can be effective. Without any evidence other than an affidavit from the officer of a complainant alleging harm and stating that the operator failed to provide comparative information, a complaint is vulnerable to immediate dismissal by the Commission. At minimum, the Commission should require that OVS operators provide copies of contracts upon request to unaffiliated programmers if negotiations for carriage are unsuccessful. Such precomplaint disclosure will enable aggrieved parties to determine whether their allegations are justified before they approach the Commission with a request that the Commission engage in a laborious dispute resolution process.

V. THE COMMISSION'S RULES ON CERTIFICATION SHOULD REQUIRE AN OVS OPERATOR TO DEMONSTRATE COMPLIANCE WITH THE LAW BEFORE IT BEGINS OPERATIONS, NOT AFTER.

A. THE COMMISSION SHOULD MODIFY ITS CERTIFICATION PROCESS TO PERMIT A MEANINGFUL OPPORTUNITY FOR COMMENTS AND OPPOSITIONS.

The Second Order states that the Commission will consider comments or oppositions to a certification that are filed within five days of the Commission's receipt of certification.[45] Given this extremely short period of time, the Commission wisely requires that certifications be filed both in hard copy and computer disk so that the Commission can post them immediately on its Internet site.

While the Coalition believes that posting certification filings on the Internet is a good idea, and practically cost-free, it is not sufficient to insure adequate notice of the fact that a certification form has been

[45] Second Order at ¶ 35.

filed. As the Commission knows, many people do not have access to the Internet, and even if they do, would have no reason to check it if they did not know that an entity had filed, or was about to file, a certification. Thus, we believe it is important for the Commission to require OVS operators to provide local public notice of their intent to file for certification in advance, and to include proof of notice in their certification request. This is similar to the requirement that broadcast applicants give notice twice a week for two consecutive weeks in a daily newspaper of general circulation.[46] Since OVS providers are also telephone companies, they might also be required to include notice in telephone bills. Notice place in newspapers and telephone bills would reach significantly more people than the Commission's Public Notice. It would also reach those with the greatest interest in the proposed service, the residents of the community to be served.

Another problem with lack of adequate notice concerns the OVS operator's efforts to provide notice to unaffiliated video programmers.[47] Again, we support the requirement that notice be given in the Commission's Daily Digest and on the Internet. However, such notice is insufficient, particularly for would-be local and non-profit programmers. The Commission's claim that the cost of such distribution exceeds the benefits is entirely without support. When the Commission considers the benefits to the public that would result from increased diversity in programming, particularly local and nonprofit programming, it is difficult to see how the slight additional cost imposed on the OVS operator to provide local notice would be substantially exceeded by the benefits derived from it. Therefore, we ask that the Commission reconsider this aspect of its order.

[46] 47 C.F.R. §73.3580(c)(1).
[47] Second Order at ¶ 45.

B. THE COMMISSION SHOULD ENFORCE THE STATUTORY REQUIREMENTS OF THE 1996 ACT BY REQUIRING OVS OPERATORS TO CERTIFY COMPLIANCE BEFORE CERTIFICATION ISSUES.

As above, we are concerned that the Commission, is relying too heavily upon dispute resolution processes that are cumbersome, lengthy, and favor the party with greater financial resources. Instead, the Commission should formulate bright-line requirements that will dispel confusion and lead to a more efficient and uniform implementation of OVS The Commission has not specified how it will be able to compel an OVS operator to comply with a number of statutory requirements without requiring that it certify performance as part of its request for certification.[48] Specifically, the Commission has declined to require that OVS operators document appropriate cost allocation mechanisms, show consent of local authorities for use of the public rights-of-way, and demonstrate that PEG requirements, if any , will be met.[49]

There is no rational basis for this decision; the justification provided by the Commission, that "the Commission should avoid turning the certification process into a 'back-door' Section 214 requirement,"[50] is not sufficient. The cost allocation, local right-of-way, and PEG access requirements are not optional; the Commission is required by law to enforce them. There is no rational basis to delay proof of compliance with these requirements to a cumbersome, undefined post-hoc process where remedies have not been defined. For instance, it is not clear what remedies an aggrieved franchise authority would have against an OVS operator that refuses to interconnect and contribute to PEG access capacity, facilities, equipment and services.

If the Commission fails to specify some enforcement mechanism for these legal requirements in the context of this rulemaking, enforcing these provisions will prove extremely difficult, if not impossible. The Commission has the power to request that proof of these requirements be included with the certification; Section 653(a)(1) does not prohibit the Commission from seeking information other than that specified in subsection

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[48] See Id at ¶29.
[49] Id.
[50] Id.

653(a)(1)(b)..[51] The certification process is the primary tool the Commission can utilize to ensure compliance with the statute and its rules. The Coalition therefore urges the Commission to require that a cost-allocation manual, grant of permission for use of rights-of-way, and proof of compliance with § 611 be included in the certification application.

VI. PROPOSED RULES ON CHANNEL-SHARING AND POSITIONING MAY RESULT IN THE OVS OPERATOR BEING ABLE TO EXERCISE UNREASONABLE DISCRIMINATION, IN CONTRAVENTION OF STATUTE.

The Coalition supports the Commission's intention to give OVS operators regulatory leeway to respond to market conditions as they begin to explore the OVS market. However, a number of the rules promulgated by the Commission will have the unintentional effect of violating the OVS provision's prohibition against discriminatory conduct by the platform operator. Together, these rules give the OVS operator a free hand in exercising full editorial control over the platform, except for those programming services required to be carried by Sec. 653(c)(2)(B). This result is not what Congress intended. We urge the Commission to re-examine these rules so that they comply with Congress' intent to build a system that does not discriminate against unaffiliated third parties.

[51] 1996 Act § 653(a)(1), 47 U.S.C. § 573(a)(1)

A. THE OVS OPERATOR'S DISCRETIONARY CONTROL OVER CHANNEL SHARING COULD BE USED TO INCREASE COSTS FOR UNAFFILIATED PROGRAMMERS' ACCESS.

The OVS operator's discretionary use of channel-sharing[52] with unaffiliated programmers, when used in conjunction with the implicit pricing mechanism described in ¶ 125 of the Second Order, will result in the OVS operator being able to maintain control over the more popular programming services on the platform. The paradigm the Commission uses to define the problem is misplaced. The danger of discrimination arises, not in the OVS operator's insistence that a channel be shared, but in the OVS operator's right to refuse to share a channel. A would-be programmer refused sharing rights would be required to: a) buy a full channel instead of a pro-rata share, and b) as part of the "reasonable price," pay not only for carriage but for "the loss of subscribers to the open video system operator's programming package resulting from carrying competing programming."[53] We understand this to mean that an OVS operator may force an unaffiliated programmer to purchase a full channel to carry the same programming as the operator carries on its own affiliate, and not only pay the full price for carriage (including the full profit margin as determined by the imputed rate), but also the profit that the OVS operator would have received from carrying the unaffiliated programmer's subscribers, had they subscribed to the affiliated programmer instead. There is no conceivable way that an unaffiliated programmer could hope to engage in a viable business venture under such circumstances, since that programmer is required to pay the lost profits of its competitor. This is equivalent to requiring Ford to reimburse GM for sales it loses to Ford. This manipulation of channel-sharing clearly inures to the benefit of the OVS operator and will have the undoubted effect of driving any unaffiliated third-party from the marketplace. We therefore urge the Commission to promulgate a rule that will ensure that a third-party programmer will be able to avail itself of the benefits of channel-sharing at the third-party's request.

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[52] Id. at ¶ 102.
[53] Id. at ¶ 127.

B. CHANNEL POSITIONING CAN BE USED TO DISCRIMINATE AGAINST UNAFFILIATED PROGRAMMERS.

In the context of OVS, channel positioning is another important tool that an OVS operator can use to ensure that undesired unaffiliated programmers are excluded from the system. Simply by offering a programmer a position that the would-be programmer wouldn't want (for instance, a block of channels at the far end of an unprogrammed block), the OVS operator will be able to offer the unaffiliated programmer something it has no choice but to refuse. We therefore ask that the Commission reconsider its decision to leave this important tool in the hands of the OVS operator.[54] We again suggest that the Commission create an independent office or board to impartially assign channel positions on OVS systems.

[54] Id. at ¶ 99.

VII. CONCLUSION

For the above-stated reasons, the Coalition respectfully requests that the Commission reconsider its decisions with respect to these matters.

Respectfully Submitted,

Jeffrey S. Hops
Director, Government Relations
Alliance for Community Media
666 11th Street, N.W., Suite 806
Washington, D.C. 20001
(202) 393-2650

Of Counsel:
Karen Edwards
Graduate Fellow, Georgetown
University Law Center

John Podesta
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9535

James Horwood, Esq.
Spiegel & McDiarmid
1350 New York Ave., N.W., Suite 1100
Washington, D.C. 20005
(202) 879-4000

Jill Lesser
People for the American Way
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

Gigi Sohn
Andrew Jay Schwartzman
Media Access Project
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 232-4300

APPENDIX A